

1 about why he believes that Mojo is similar to
2 WealthTV, that's his business. He's in
3 competition with Mojo. He's every day
4 thinking about programming. They have
5 meetings every week to say what programs
6 should we put on? What kind of stuff is our
7 competition doing? Who can we sell this to?

8 This is what he does. He's
9 learned it from running the business. He's
10 not saying that I know this by virtue of my
11 expertise or anything in particular other than
12 running this business. And that's the kind of
13 lay testimony that is let in and given the
14 relaxed standards here for an administrative
15 proceeding, the D.C. Circuit's standard in
16 EchoStar, it doesn't matter if it's hearsay.
17 He doesn't have to know it personally.

18 The Administrative Judge isn't a
19 jury. This is susceptible to the kind of
20 prejudice from seeing somebody with a Ph.D.
21 come up and say something that the Daubert
22 gatekeeper function is meant to insulate a

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1 jury from that kind of prejudice.

2 Because Your Honor is an expert in
3 hearings and an expert in the subject matter,
4 you can weigh for yourself whether this stuff
5 is relevant or not. You can give it whatever
6 credit you think it's worth and that's
7 essentially what the Courts have done in
8 administrative hearings and what we're asking
9 you to do here.

10 A few specifics, Mr. Cohen
11 correctly mentions a few newspaper articles
12 and blogs, there are a few things of that
13 nature. But much of the hearsay in this case
14 is Defendants' own exhibits. There's no
15 surprise. There isn't really factual dispute
16 about a lot of this stuff. They do put on
17 these programs. They do have these people on
18 them. They do look similar.

19 Yes, an expert can look at it and
20 say I've reviewed thousands and thousands of
21 hours of reels and I found statistical
22 correlations. And a programming executive can

1 look at it and say well, I normally review
2 programming this way and this is how a
3 programming executive does it. An ad seller
4 can say well, this is the kind of things my
5 customers like to buy. They like to buy
6 programming of this sort, put these kinds of
7 ads on.

8 And a business owner can say I
9 develop programming to suit the carriers. I
10 develop programming to compete with these
11 kinds of programs. I develop programming to
12 satisfy programming executives. There are
13 three different perspectives on the same
14 thing. Are they cumulative? Yes, to some
15 extent. But there's no particular reason not
16 to let them in.

17 The other point they seem to be
18 making is a point of surprise, the 2000
19 amendments to Rule 701, mentioned in their
20 briefs. Essentially, the Court -- I mean the
21 Rules Committee added in a third portion to
22 701 saying not only does it have to be on

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1 personal perception, not only does it have to
2 be helpful to the Court, but it also cannot be
3 on matters of scientific expertise requiring
4 specialized reasoning processes. For
5 statistics, you'd want to be a statistician.
6 For medicine, you'd want to have a medical
7 degree. These aren't those kinds of
8 processes.

9 This is business. This is basic
10 marketing. Is it going to appeal to this
11 audience? Is it going to appeal to that
12 audience? Yes, there are people who make a
13 living doing that, but it's not the kind of
14 expertise that requires special scientific
15 training. And we don't think it should be
16 excluded.

17 JUDGE SIPPEL: You do have --
18 well, what about -- before I get to that, what
19 about this question. There was a schedule set
20 up for identifying experts and there was a
21 mishap, I know, with one of the first experts.
22 And that Palmer was replaced by Ms. McGovern.

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1 So -- and we made an exception in the
2 scheduling to accommodate that.

3 So why didn't we have this witness
4 proffered as an expert at that time?

5 MR. ROSE: Well, we thought that
6 as the operator of the business, he can talk
7 about what he did in the business, in the
8 kinds of analyses he did.

9 Yes, there's a paragraph or two
10 that Mr. Cohen properly points out could be
11 characterized as rebuttal and maybe those
12 couple of paragraphs ought to be kept out.
13 But the vast majority of this stuff was in the
14 pleadings before the Media Bureau and there's
15 a separate question that will probably come up
16 today as to whether those pleadings are
17 properly in the record or whether the record
18 is effectively expunged and starting from
19 scratch.

20 We obviously think that the
21 pleadings are already there and there isn't a
22 particularly good reason. In any event,

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1 there's no surprise to Defendant. He's been
2 telling the same story since he started this
3 proceeding. He's been saying they're similar.
4 He's got a little bit more detail in here, but
5 it's not really changed.

6 JUDGE SIPPEL: That sounds like
7 it's a lit bit of a finesse on this.

8 If you want to let him testify as
9 a fact witness, I have no problem. If he's
10 got -- if he wants to cite the reasons why he
11 thinks programming is sufficient, programming
12 is similar, he could do that in a generic way.
13 He doesn't have to go through the kinds of
14 evidence that Mr. Cohen was citing to. I
15 haven't completely read the witness's
16 testimony yet, so I'm going to reserve on this
17 for a time until I can get it focused. But in
18 the meantime, I'm going to have both of you go
19 back down and try and negotiate some of this
20 stuff.

21 You even conceded there's a couple
22 of paragraphs that maybe should come out.

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1 I'll bet you're going to find more than a
2 couple. I do not want to hear as a general
3 proposition, I don't want to hear the party to
4 the case that has the biggest interest in the
5 outcome of the case trying to convince me that
6 he is an expert in certain areas that are
7 essential to the case. Do you know why?
8 Because I think he's a bit prejudiced.

9 I'm supposed to get as neutral --
10 now I understand that the witnesses as experts
11 are not 100 percent neutral in the sense that
12 they're being retained to give an opinion, but
13 there's an element of neutrality there that is
14 not going to be present with a party to the
15 case.

16 And I can rely on him for a lot of things, but
17 I don't want to have to rely on him for
18 expertise.

19 MR. ROSE: Your Honor, we are
20 offering him as a fact witness. And if I
21 might just give an example perhaps to give
22 some clarification. It might help us in

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1 negotiating.

2 An example of one of the things
3 that they appear to be objecting to, WealthTV
4 as a matter of course through the years has
5 had some kind of apparatus on the sets that
6 gives them some feedback on who's looking at
7 their shows. One of the experts did a survey
8 based on those data and he testified about his
9 survey. Mr. Herring also looks at those data.
10 He has been all along. He provides a count.
11 He provides an update on the count in here.
12 That's one of the things that's been updated.
13 I'm sorry, it's an internet thing. It's not
14 on sets. I have the facts wrong. But the
15 basic idea is his company has been collecting
16 this stuff. He had an expert opine on it, but
17 he's also giving an account. He's added them
18 up.

19 JUDGE SIPPEL: Why do I need him,
20 if I got the expert? Why do I need him?

21 MR. ROSE: He's updating the
22 count.

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1 JUDGE SIPPEL: What do you mean
2 updating it?

3 MR. ROSE: I think it's an on-
4 going count. I'm not exactly sure.

5 JUDGE SIPPEL: And the witness
6 hasn't completed the count? In other words,
7 he's doing what he's paying the witness to do?

8 MS. WALLMAN: I believe the
9 witness has done some corrections after his
10 deposition, but as Mr. Cohen points out, there
11 weren't any rebuttal reports. So they aren't
12 in the report.

13 MR. COHEN: Your Honor, can I just
14 --

15 JUDGE SIPPEL: Wait just a second.
16 I still don't -- I have to be sure I'm
17 understanding this.

18 You would not be in a position --
19 when the expert gets on the stand, you're
20 going to offer him, obviously -- you've got
21 the written testimony. And you would not be
22 in a position to say is there anything that

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1 you want to change or supplement? You
2 couldn't ask that question to him?

3 MR. ROSE: I'm sure we could, Your
4 Honor. I just want to --

5 JUDGE SIPPEL: Couldn't he then
6 say yes, in fact, I didn't finish this aspect
7 here about listening to feedbacks on the
8 internet or something like that. And there
9 would be some more information to give on
10 that. Then there might be an objection and we
11 go through that, but basically witnesses do
12 have an opportunity to update their written
13 testimony as long as they're not changing it.
14 And now they're on notice anyway on it. But
15 why bring your principal -- why bring the
16 licensee -- well, not the licensee, but why
17 bring this gentleman who owns all of the --
18 who has so much at stake, why bring him into
19 this? Why does he have to think about this
20 stuff? He's got business things to think
21 about.

22 MR. ROSE: Your Honor, it is his

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1 business and he does look at this stuff as a
2 matter of course.

3 JUDGE SIPPEL: Sure.

4 MR. ROSE: He's not trying to give
5 an expert opinion. He's testifying as a fact
6 witness. I think the idea of trying to work
7 things out is probably good and we can
8 probably limit the issues for you.

9 JUDGE SIPPEL: I want you to work
10 hard on it because that's a thick piece of
11 written testimony and I'm looking for a
12 succinct story that says look, we tried to get
13 this contract, we couldn't get it and why.
14 They don't put theirs in writing. I put mine
15 in writing. This, this, this is happening and
16 that's why I'm being treated unfairly, if
17 that's what the story is. But why he has to
18 go into this stuff that he's paying good money
19 to an expert who can tell me and think that I
20 would want to put the expert aside to listen
21 to him. That doesn't make any sense. It just
22 makes no sense to me at all.

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1 MR. ROSE: Just as a matter of
2 timing and procedure, Your Honor, given that
3 he's testifying in the next couple of days,
4 would you want us to put in an amended thing
5 after the cross examination has occurred, an
6 amended direct testimony?

7 JUDGE SIPPEL: No, no, not after
8 cross examination has occurred. I want you to
9 sit down with the other side and go through
10 his testimony again in light of what I'm
11 telling you and completely recast this. I
12 mean it's going to need recasting. I'm not
13 saying everything that Mr. Cohen is objecting
14 to that you have to go along with it. I'm not
15 into it that deep yet. But there should be a
16 way that you can agree to 90 percent of what
17 he's saying. You know where I'm coming from.
18 If I have to go down it line by line, but
19 that's going to take -- everybody is screaming
20 about time here.

21 I'm willing to do things on the
22 quick as much as I can. And if I've got to

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1 sit down and go through these things line by
2 line, it's going to take a long time.

3 MR. ROSE: I understand, Your
4 Honor. thank you.

5 JUDGE SIPPEL: And I think that
6 your client has better things to do.

7 Now I'll tell you this, let me
8 give you an example. You can go back and tell
9 him this and if he's in the courtroom, he'll
10 hear me, but I'll tell you if the owners of
11 the Titanic came in and they wanted to explain
12 to me why the damn thing went down and I'm not
13 going to pay much attention to his experts
14 because he knows more than his experts do, I
15 don't think I'm going to listen to the owner
16 of the Titanic. I want to his story, but not
17 for that reason.

18 So this is just puzzling me to no
19 end, particularly from a party that's been
20 screaming about time. I mean this is how we
21 waste time. But that's got nothing to do with
22 the merits of the case. So --

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1 MR. COHEN: Your Honor, can I just

2 --

3 JUDGE SIPPEL: Well, I don't think
4 you have to. I want to leave it where it is.

5 MR. COHEN: We'll certainly sit
6 down with him this afternoon.

7 JUDGE SIPPEL: I don't want to get
8 into this back and forth stuff.

9 MR. COHEN: We'll sit down with
10 him. We're happy to do that as soon as we're
11 done with documents and admissions.

12 JUDGE SIPPEL: Thank you, thank
13 you. No, I'm not going to put a deadline on
14 that. You let me know how it's going.

15 MR. COHEN: He's the first
16 witness.

17 JUDGE SIPPEL: He's the first
18 witness?

19 MS. WALLMAN: Yes.

20 JUDGE SIPPEL: Can you move him
21 out of the first spot?

22 MS. WALLMAN: I'll explore it. I

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1 think it would be highly disadvantageous to
2 us.

3 JUDGE SIPPEL: Why?

4 MS. WALLMAN: Because he's the
5 person who is going to tell the story.

6 JUDGE SIPPEL: Right, but who is
7 your second witness?

8 MS. WALLMAN: Our second witness
9 would be an expert, Sandy McGovern.

10 JUDGE SIPPEL: Well, it's your
11 case and I'm not going to tell you how to try,
12 but I don't see in light of what the status of
13 the situation is now and I didn't create this,
14 that we can't -- you can't start your case
15 with an expert. He's not going to tell
16 anything different I wouldn't think than Mr.
17 Herring.

18 But on the other hand, if you need
19 more time, we'll find some reason. If you're
20 insisting on him going on first, we'll do
21 that.

22 I have a medical consultant I need to see and

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1 I can go down and consult him while you're
2 doing this.

3 MR. ROSE: Can we report back at
4 say 4:30 or 5 this evening, let you know where
5 we stand after meeting with Mr. Cohen?

6 JUDGE SIPPEL: Sure, you can give
7 me emails. Yes, I'll be here. I'll be here.
8 And we're going to break for lunch and maybe
9 you'll have another update by the time we come
10 back from lunch. Maybe we won't have to break
11 for lunch. Maybe we'll get everything in
12 before lunch.

13 So whatever happens, happens. You
14 know? That's the name of the game.

15 All right. So what's next on the
16 agenda. Next on the agenda is this other
17 witness from what's the name of that company.
18 It begins with a small letter and it goes into
19 capitals?

20 MR. ROSE: It's IN DEMAND.

21 JUDGE SIPPEL: IN DEMAND. Why do
22 we have to bother with subpoenaing them? Why

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1 do we have to subpoena them? I got the same
2 question. Go ahead, I'm sorry.

3 MS. WALLMAN: Your Honor, part of
4 the Herring testimony relied on statements of
5 Mr. Jacobson that were objected to. Mr.
6 Jacobson is not present. Mr. Asch, who I
7 understand to be a subordinate of Mr.
8 Jacobson, has been called by Defendants to
9 testify.

10 JUDGE SIPPEL: Well, can you focus
11 a little bit on what do you need Mr. Jacobson
12 to -- what relevant issue to this case or what
13 issue in this case is Mr. Jacobson so relevant
14 and necessary that we have to subpoena him
15 here?

16 MS. WALLMAN: Mr. Jacobson was
17 widely quoted about the -- about Mojo.

18 JUDGE SIPPEL: By who? By the
19 press?

20 MS. WALLMAN: In the press, yes,
21 Your Honor.

22 JUDGE SIPPEL: Yes, ma'am.

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1 MS. WALLMAN: And Mr. Asch not so
2 much. And if we have hearsay issue with
3 respect to what Mr. Herring has read and has
4 used in understanding his competition, then as
5 a contingent matter, we would ask Your Honor
6 to consider, to allow us to bring Mr. Jacobson
7 into the courtroom.

8 JUDGE SIPPEL: And that's for
9 purposes of propping up the reliability of
10 newspaper articles?

11 MS. WALLMAN: It's for the purpose
12 of asking him whether he made the statements
13 in the newspaper articles.

14 JUDGE SIPPEL: Well, I don't read
15 newspaper articles with that in mind. I don't
16 know who is going to read the newspaper
17 articles. Even if they're in the record,
18 unless you've got a live witness on the stand
19 and he's going to be shown something, whether
20 that's true or not. I don't pay attention to
21 newspaper articles. They're hearsay upon
22 hearsay upon hearsay.

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1 So I don't pay attention to them.
2 Unless, there's a focus. If there's a focus
3 with the witness, then that's a different
4 story. So don't worry about propping up
5 newspaper reports. They're on their own.

6 So whatever was said in the
7 newspapers, I don't care about, as a general
8 proposition.

9 MS. WALLMAN: Well, for example,
10 there have been contradictory statements about
11 the demographic of Mojo. Mr. Jacobson has
12 said in the press it is 25 to 49. In other
13 testimony, including Mr. Asch's, it's referred
14 to as 18 to 49.

15 JUDGE SIPPEL: Well, you could ask
16 Mr. Asch.

17 MS. WALLMAN: Sure, I believe I
18 can, Your Honor. I can try to do that. I
19 don't know if impeaching him with other
20 statements made by company officials.

21 JUDGE SIPPEL: Well, yes, you can.
22 But beyond the question of impeachment, if

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1 Asch says he saw it one way and Mr. Jacobson
2 said in the newspaper he saw it another way,
3 then either one of them is correct. And one
4 of them has to be right and one of them has to
5 be wrong, unless the newspapers got it wrong.
6 God forbid. Right?

7 MS. WALLMAN: Yes, Your Honor.

8 JUDGE SIPPEL: I think Mr. Asch
9 can help us with that. I don't have anything
10 against Mr. Jacobson, but why bother the guy
11 if we don't need him, when time is always of
12 the essence, I've been told..

13 All right, so I'm going to deny
14 Jacobson to you. I'm going to deny that
15 motion to issue a subpoena for Jacobson. If
16 Asch turns out to be a calcitrant witness or
17 if Asch is a reluctant witness or if Asch is
18 in any way giving me a hard time, I'll
19 reconsider, but if it appears that Asch is
20 telling the truth and he knows enough about
21 the situation to tell us what we need to know,
22 then Mr. Jacobson can stay home or do whatever

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1 he does.

2 Okay. Is there anything else
3 pending as preliminary?

4 Everyone knows the ground rules
5 about the press? Unless you've got something
6 -- and you've got to be the judge in the first
7 instance, but I'm talking about stuff that's
8 really critical because its current
9 projections of what's going to happen as
10 opposed to ancient data with numbers that
11 really aren't going to mean anything today.
12 But you have to be the initial judge of that.
13 I'm all for letting the press in as much as I
14 can, simply for the reason that I don't want
15 to go in and out, in and out, in and out. I
16 tried that once and I didn't -- I wasn't
17 correct what I did.

18 So let's do it -- I'm just telling
19 you this so that you're aware of what's going
20 on. I know everybody knows what the situation
21 is.

22 All right, let's go forward. Who

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1 goes first, WealthTV goes first with your
2 documents. Are they in --

3 MR. COHEN: Your Honor, what we've
4 done, if I may --

5 JUDGE SIPPEL: Yes, sir.

6 MR. COHEN: To try to expedite
7 this, we did exchange objections with each
8 other last week.

9 JUDGE SIPPEL: Okay.

10 MR. COHEN: And we were able to
11 clear away some of the exhibits on each side
12 and we're prepared to discuss our objections
13 to the Wealth exhibits, starting with number
14 one, if that would suit Your Honor.

15 JUDGE SIPPEL: Yes. Any way you
16 can do it. Now if you don't -- are they in
17 binder form or you know -- is that it in the
18 looseleaf form, ma'am?

19 MS. WALLMAN: Yes, Your Honor.

20 JUDGE SIPPEL: Because what we did
21 on the other cases, we just identified the
22 number of tabs that were in a particular

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1 volume. For purposes of the record, they're
2 marked. And then the reporter is going to
3 have to physically mark them after we leave
4 the courtroom. We don't have to sit here and
5 let every piece of paper get marked.

6 MR. COHEN: Yes, sir.

7 JUDGE SIPPEL: But there was not.
8 much objection on anything that was going in,
9 so it worked pretty smoothly. You have
10 specific objections, I have to rule on them.

11 MR. COHEN: There are a number of
12 objections here, Your Honor.

13 JUDGE SIPPEL: We'll have to take
14 them that way.

15 MR. COHEN: And we're prepared to
16 start. Do you want to start with A1? Any way
17 --

18 JUDGE SIPPEL: Let's get a proffer
19 first. Are you prepared to offer your first
20 exhibits in this case, Ms. Wallman?

21 MS. WALLMAN: Yes, Your Honor.

22 JUDGE SIPPEL: Okay, and they

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1 would be? Take the first volume and tell me
2 what the tab numbers are.

3 MS. WALLMAN: The first volume,
4 tab number that we're looking is WealthTV
5 Exhibit A1.

6 JUDGE SIPPEL: A1, thank you. Is
7 it tabbed?

8 MS. WALLMAN: It is tabbed, Your
9 Honor.

10 JUDGE SIPPEL: What are the tab
11 numbers?

12 MS. WALLMAN: The tab number is
13 A1.

14 JUDGE SIPPEL: A1 through what?

15 MR. MILLS: I'm sorry, were these
16 renumbered now?

17 JUDGE SIPPEL: I mean usually the
18 tabs go like from 1 to 50 or something like
19 that. But A1 --

20 MS. WALLMAN: Yes, Your Honor.
21 We're happy to renumber as best suits Your
22 Honor. We had several transfers of these

1 exhibits that were exchanged with the
2 Defendants and we agreed on a numbering
3 system, but if it doesn't suit you, we'll do
4 it differently.

5 JUDGE SIPPEL: You don't have to
6 suit me, but it has to make some sense. If
7 there are independent exhibits within the one
8 volume, that is, separate exhibits, and it's
9 not all one exhibit, then it has to be
10 numbered. There were instructions starting
11 back with Judge Steinberg, who was pretty
12 specific on that.

13 MS. WALLMAN: Yes, Your Honor.

14 JUDGE SIPPEL: So tell me what
15 we're dealing with, please.

16 I've got tabs -- are we talking
17 about the same thing? I've got tabs going
18 through 25.

19 (Pause.)

20 Why don't we go off the record?
21 Why don't we go off the record and get this --
22 find out where we are.

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